



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Star Detective & Security Agency, Inc. and E.L.A. Security, Inc., a Joint Venture

File: B-260948.2

Date: August 28, 1995

Daniel C. Overton for the protester.

Ronald E. Cone and Paul A. Gervas, Esq., Department of Energy, for the agency. Wm. David Hasfurther, Esq., John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Acceptance of a proposal by a Department of Energy prime contractor from a small disadvantaged business (SDB), which subcontracts a portion of the work under an SDB set-aside, is not objectionable since the solicitation did not prohibit subcontracting to a non-SDB, and there is no basis to conclude that the firm is not a bona fide SDB as defined by the solicitation.

DECISION

Star Detective & Security Agency, Inc. and E.L.A. Security, Inc., a Joint Venture, (Star/E.L.A.) protests the award of a subcontract to Jenkins Security & Investigations, Inc., under request for proposals (RFP) No. BSS/SEC-4774-RCH, a 100-percent small disadvantaged business (SDB) set-aside for unarmed security guard services issued by Fermi National Accelerator Laboratory (Fermilab), through Universities Research Association, Inc., as a prime contractor with the Department of Energy (DOE).

We deny the protest.

The RFP required offerors to submit technical and price proposals for furnishing the guard services, including the management, supervision, materials, and equipment for a 1-year base period and two 2-year option periods. The RFP advised

that the contractor is to provide at least 25 security officers with specified levels of experience and that previously the services were provided by 28 full-time and 9 part-time security officers.

The RFP advised that technical proposals would be scored numerically in accordance with stated criteria. In making the award determination, technical proposals were to be considered significantly more important than price. Where offerors' technical proposals were "substantially equal," price was to be the determining factor. Award was to be made to that responsible offeror whose offer represented the best value to Fermilab based on price and technical criteria.

Eight offers were received by the closing date. On the basis of technical evaluation scores and submitted prices, Fermilab included in the competitive range the three highest-scored offers from Jenkins, Star/E.L.A., and Mid-Atlantic Security. Fermilab sent letters to these three firms requesting clarifications of proposal discrepancies, received the responses, and requested best and final offers (BAFO). Since Jenkins had submitted the highest-scored and lowest-priced proposal, award was made to that firm.

Star/E.L.A. argues that Fermilab denied it the right to file a pre-award protest against Jenkins's SDB status by improperly failing to provide it notice of the awardee prior to award, as required by Federal Acquisition Regulation (FAR) § 15.1001. Star/E.L.A. also contends that the non-SDB subcontractor, Dynamic Security, Inc., is the actual awardee here because it allegedly will perform more than 50 percent of the contract work, a fact which would have precluded any award to Jenkins had Jenkins made an honest representation of its intentions in its proposal.

Concerning the notice required by FAR §15.1001, any contractual relationship resulting from this solicitation is between the awardee and Fermilab, and the applicable case law and regulations provide that purchases by government prime contractors are not subject to all of the requirements applicable to direct federal procurements, but are commercial purchases subject only to the fundamental procurement principles which constitute the "federal norm." U.A. Anderson Constr. Co., B-244711, Oct. 16, 1991, 91-2 CPD ¶ 339. Since the federal norm does not impose an obligation to comply with the FAR requirement to notify offerors of the identity of the proposed awardee prior to award, there is no basis to challenge Fermilab's action on this ground.

With respect to the protester's contention that Jenkins did not meet the SDB requirement set forth in the solicitation, Fermilab and DOE argue that only the Small Business Administration (SBA) has the authority to determine SDB status. SBA, however, has advised us that it has no jurisdiction over the issue.

Regarding the awardee's SDB status under the RFP, in order for an offeror to be considered an SDB, it has to be at least 51 percent unconditionally owned by one or more individuals who are socially and economically disadvantaged and its management and daily business has to be controlled by one or more such individuals. The protester does not argue that Jenkins does not qualify as an SDB; rather, the protester alleges that Jenkins is allowing a non-SDB subcontractor to perform a significant portion of the work. The protester does not point to anything in the RFP or other authority applicable to this contract which prohibits subcontracting by the SDB. Cf. Science Sys. and Applications, Inc., B-240311; B-240311.2, Nov. 9, 1990, 90-2 CPD ¶ 381. Further, while there is evidence in the record which supports the protester's view that Dynamic is contributing to the performance of the contract, we cannot conclude that Fermilab unreasonably found that Jenkins was eligible for award under this SDB set-aside.

Jenkins submitted a cover letter with its proposal which stated in part:

" . . . I am also pleased to have Dynamic Security Inc. join with Jenkins Security & Investigations, Inc. as a subcontractor to us for necessary key resources required, and for the performance of certain of the key responsibilities under the proposed contract. Jenkins Security & Investigations will not subcontract out more than 49% of the value of the contract Enclosed is our joint proposal on Dynamic Security Inc. letterhead."

Despite this certification, Fermilab had concerns regarding the legal relationship between Jenkins and Dynamic because, among other things, the proposal was submitted on the letterhead of Dynamic, was signed by Dynamic's regional manager, the proposal referred to the proposal as "our proposal," and referred to the relationship between Jenkins and itself as a "joint venture." Fermilab specifically asked Jenkins during discussions to clarify whether the work would be performed on a joint venture basis. Jenkins replied that it was not proposing as a joint venture and confirmed that it would subcontract no more than 49 percent of the work to Dynamic and that Dynamic "has agreed to provide support to assist in the day-to-day execution of the contract in areas where Jenkins, due to limitations because of its size and available critical resources for a job of this magnitude, requires a certain level of support to ensure that Fermilab receives the highest quality of services." Jenkins's proposal also contained an organizational chart which showed that Jenkins would control contract performance. Thus, Fermilab inquired into the matter and Jenkins explained its relationship with Dynamic. Fermilab concluded that Jenkins satisfied the RFP definition of SDB as to ownership and control.

As mentioned previously, procurements by government prime contractors are governed by the federal norm, not by the more detailed regulatory requirements applicable to procurements by government agencies. The federal norm imposes no

requirement as to the percentage of work that must be performed by an SDB contractor. Therefore, any such limitation must be found in the RFP. The RFP in this case did not prohibit the SDB's subcontracting of the work. Based on the proposal submissions, we cannot say Fermilab's selection of Jenkins for award as an SDB was unreasonable.¹

Star/E.L.A. also contends that Fermilab failed to conduct meaningful discussions since it did not bring to Star/E.L.A.'s attention the fact that the firm had failed to list double-time billing rates for holidays in the appropriate place on the RFP's pricing pages and had instead included them elsewhere in its price. The protester states that correction of this "mistake" would have resulted in its offer being the lowest priced.

Star/E.L.A. stated in its price proposal that because "we have chosen not to have any double time rates We have chosen to build these rates into our basic rate, [and] therefore there will be no additional charge for holidays." Thus, Star/E.L.A. consciously chose to structure its price proposal in the manner that it did. It did not intend to structure its price in the manner it now—presumably because the change would lower its evaluated price—states that it should have. Correction is not permitted under these circumstances. See McGhee Constr. Inc., B-255863, Apr. 13, 1994, 94-1 CPD ¶ 254; Pulau Elecs. Corp., B-254443, Dec. 17, 1993, 93-2 CPD ¶ 326.

¹We recognize that Jenkins' proposal contained information which suggests that Dynamic's role in contract performance may be larger than represented. Nonetheless, while we believe Fermilab might have investigated the relationship between Jenkins and Dynamic more thoroughly, we cannot conclude that anything in this record reasonably establishes that Jenkins misrepresented its relationship with Dynamic and its status as an SDB.

In addition, since Star/E.L.A.'s proposal indicated that the price was structured in the manner intended by the firm, we do not see why the matter was required to be raised during negotiations.²

The protest is denied.

/s/ Robert H. Hunter
for Robert P. Murphy
General Counsel

²Star/E.L.A. also contends that the RFP contained deficiencies that required correction before a proper award determination could be made. This contention is untimely. Our Bid Protest Regulations require that protests based upon apparent alleged improprieties in an RFP must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). Since Star/E.L.A. did not file a protest on this matter until after contract award, this allegation will not be considered.